APPEAL NO. 93379

On April 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether claimant had sustained an injury on (date of injury), in the course and scope of his employment with (employer), whether he had given timely notice of such injury to his employer, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01 (Vernon Supp. 1993) (1989 Act), and whether he had disability as a result of that injury. The hearing officer determined that the claimant had sustained a repetitive trauma injury to his back, with the date of injury of (date of injury), but that he had not given timely notice of that injury to his employer, and the employer did not have actual notice of such injury. The hearing officer determined that although the claimant had informed his employer of a work-related back injury, he informed them of the "wrong" injury, that is, a specific injury of July 1991. The hearing officer agrees that the evidence proves that claimant cannot work because of his back condition, but finds that he did not have disability because the back injury is not compensable as a result of failure to give timely notice.

The claimant has appealed, and is adamant that he informed his employer of his injury, and that the hearing officer's determination that he did not is wrong. The carrier responds that the hearing officer's determination should be supported unless against the great weight and preponderance of the evidence is to the contrary. Significantly, no one has appealed the determination that claimant sustained a repetitive trauma injury.

DECISION

After reviewing the record, we reverse the determination of the hearing officer as to the notice issue, and render a new decision that claimant gave timely notice of a repetitive trauma injury, and that he sustained disability therefrom.

The claimant, who worked as a truck driver for the employer, came to the hearing arguing that on (date of injury), as he was pulling down a "loading arm" to unload the contents of his tank truck, he pulled his back. The next day, a Saturday, he was supposed to work but went to the emergency room of Hospital at around 4:00 in the afternoon because of the pain. He stated that he called the dispatcher for the employer around 5:00 p.m. to tell him of the injury. Claimant agreed that he had sustained a similar injury the previous year, and indeed had filed a claim for the injury which had been the subject of an earlier contested case hearing.

Claimant said he called the dispatcher around 8:00 p.m., later that same night, to report that he had been taken off work by the doctor, and that he had a muscle strain to his back. The hospital emergency room notes do not document that claimant told of a specific July 17th injury, but indicate that claimant reported back pain over the previous three weeks. Claimant denied that this was what he told the doctor.

The claimant said that when he went to the office on Monday, July 20th, he met with the insurance adjuster for the company, his supervisor, (Mr. B), and a secretary whose name he recalled as "Mert." He indicated that, in the spirit of being completely honest, he told them of his 1991 injury and that he had had some pain since then. He also said that he told them of the re-injury on (date of injury), but that they were concerned with the fact that his file documented a 1990 injury and not the 1991 injury. Claimant said he filled out a report of injury that left the date of injury blank. He was asked to go home and locate paperwork on his 1991 injury, and when he could not find it, the employer called and said they would use the reported August 1990 injury. The employer referred claimant to (Dr. V), who he saw on July 22, 1992.

The dispatcher's relevant notes for July 18th are as follows:

5:00/ Mac called from hospital. Doesn't know if he'll be out at 8 pm or not. Would not be specific but I advised him to call as soon as he knows if hes (sic) gonna work or not. He says he's being checked by a doctor.
8:10 pm/ Mac called back and said doctor has ordered him to bed for bedrest due to back problems. He says he has doctor order to that effect. I advised him to be sure and touch base with Wilton on Monday and let him know how long he'll be down. (Underlining in original, not added).

A dispatcher's note from the next day, Sunday, July 19th, states: "Mac- Dr. got him on medicine- strained muscle- come back in 5 days- maybe old strain from Chevron." ("Mac" was identified by Mr. B as referring to claimant.)

Dr. V's initial medical report for the July 22nd visit lists a date of injury of August 1990, diagnoses lower back strain, recites a history that claimant was hooking up a loading arm and felt a pull in his lower back, and then states "[n]o history of prior injury to back since 8-1990." It further states "[a]ccording to patient his back has been stiff hurting on and off since 1990. Physical work, driving, lifting, bending, and working hoses, etc. Last week backache worse after half bending and bending to hook up a loading arm. Was seen at ER, was given medicine but has not gotten filled." This report lists the insurance carrier as "employer." It is stamped as "received August 6, 1992, Corporate Claims (illegible) Inc."

An October 20, 1992 letter from Dr. V to the carrier's attorney states that the August 1990 date on the report was supplied by the employer, not the claimant.

A reference to "Corporate Claims" also appears printed on the top of an October 8, 1992 letter from (Dr. R) submitted into evidence by the carrier. In that letter, Dr. R recites a date of injury of July 1991 and documents discomfort stemming from that all during the year, up through claimant's visit to the emergency room.

The hearing officer notes in her decision that claimant agreed that at a contested case hearing on the 1991 injury, he mentioned only his 1991 injury and not his 1992 injury. However, the transcript from that other contested case hearing was tendered by the carrier, and admitted without objection or qualification. As such, it has become part of the record of this case. It clearly sets forth the following question and answer on direct testimony:

Q: I'd like to start talking more about when you actually had to discontinue work with (emplpyer). Would you explain in detail what happened to you in July of '92 that caused you to cease your employment?

A: Well, in the process of loading, I reinjured myself. I went to the emergency room on the 18th of July and when I . . . at Hospital and I got there and I seen the doctor.

The claimant said that he turned in doctor's slips to his employer throughout his treatment. Medical records from other doctors indicate that claimant did not improve with conservative treatment, and in October 1992 he was diagnosed with a herniated disc. Surgery has been recommended by (Dr. S), with Southeast Texas Neurosurgery Associates. A December 7, 1992 letter to this effect from Dr. S, to "DB" of "National Union Fire Insurance Company" is in evidence. It is stamped across the top with a line showing the name of "Corporate Claims." On December 9, 1992, "DB" signed a Required Medical Report/Spinal Surgery Recommendation as the carrier's representative, which form clearly designated claimant and listed an injury date of (date of injury).

Mr. B agreed that he met with the claimant a few days after he had been in the hospital, on either Monday or Tuesday. He denied that he was ever told of a specific (date of injury) incident prior to being contacted by the insurance carrier in October 1992. However, Mr. B agreed that the following conversation took place:

Q: Did he say anything to you along the lines of, "Mr. B", or, "T, I reinjured my back this past Friday, July 17th of 1992?"

A: No.

Q: "Mr. B, I know I've been having back problems; but I pulled my back again just this last Friday, July 17th, 1992?"

A: Not at that point. The only thing I had was what was in these notes,[1] and he said something about he'd been hurting for a month or so. (emphasis added)

[1] The reference is apparently to the dispatcher's notes, about which Mr. B had just testified.

Mr. B also acknowledged that the dispatcher on duty July 18th had called him a little after 5:00 pm that night and reported that claimant was in the emergency room. Mr. B stated: "I told him to go ahead and tell them to check the man, and then we would get with him when he was able to come out and fill out any report."

Finally, (Mr. JS), the director of quality control for the employer, testified that he first found out about the alleged July 17th 1992 injury in October 1992, when he was contacted by "DB . . . in corporate claims management who represents the insurance carrier, the claims handler."

The findings that claimant sustained a repetitive trauma injury, as opposed to a specific aggravation, has not been appealed and thus will be taken as an established fact. The hearing officer, having determined that claimant had sustained a repetitive trauma injury, rather than a specific injury, nevertheless appears to base her no notice decision on the failure of claimant to specify a (date of injury) injury, as opposed to a 1991 injury. However, Mr. B also plainly stated that claimant complained he had been hurting for the past month. As previously held by the Appeals Panel[2], the sufficiency and scope of what is notice of injury under the 1989 Act should be liberally determined because the purpose of notice is to allow prompt investigation of facts underlying an injury. *See also* DeAnda v. Home Insurance Co., 618 S.W.2d 529, 533 (Tex. 1980). Claimant's notification that he had been hurting the past month may be inconsistent with notice of a specific injury, but it is quite consistent with the hearing officer's determination that claimant sustained a repetitive trauma injury.

Furthermore, we would note that facts in the record indicate that, although the hearing officer determined that the employer did not have actual knowledge of a (date of injury) injury, the employer and the carrier had such actual knowledge. Article 8038-5.02(1) lists an exception to notice where there is "actual knowledge" of injury by either the employer or the insurance carrier. We have stated that for an employer to have actual knowledge of an injury, the exact time, date and extent of the injury need not be specified, only the general nature and that it is job-related. *See* Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993. (In that prior hearing, we reversed the hearing officer's determination of no actual knowledge based upon facts similar to the ones in this hearing). It is clear that the employer realized that the back strain was work-related, as claimant was called to the office on Monday for the purpose of filing an injury report.

We have also held that a carrier can be found to have "actual knowledge of injury" from a doctor's bill that advises of the nature of the injury and the fact that it occurred at work, which is received by the carrier within the 30 day period. Texas Workers' Compensation Commission Appeal No. 92710, decided February 16, 1993, citing Cadengo

[2] Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993.

v. Compass Insurance Co., 721 S.W.2d 415 (Tex. App.- Corpus Christi 1986, no writ). The record clearly reflects receipt of Dr. V's report on August 6, 1992, by the carrier's adjuster, well within the thirty day period after the date the hearing officer finds was the date of the repetitive trauma injury. Although Dr. V's report lists an erroneous 1990 date of injury at the top of the form, the text clearly indicates that claimant sustained a work-related injury "last week," the week before July 22, 1992, the date of examination by Dr. V. The circumstances of that injury are described in Dr. V's report. It is the carrier, in this case, that should bear the burden of an apparent failure to react to the substance of this report, not the claimant who was injured within the course and scope of his employment.

In short, we find that the great weight and preponderance of the evidence is against the hearing officer's determination that timely notice was not given, or that there was no actual knowledge of injury as would constitute an exception to the notice requirement. The decision that the carrier is absolved of liability for the claim because of the failure of claimant to give notice is hereby set aside as so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Because the hearing officer already agreed that claimant is unable to obtain or retain employment due to the effects of his work-related repetitive trauma injury, we render a decision that the claimant has disability, as that term is used in Article 8308-1.03(16), from July 18, 1992, the date disability began, until claimant's disability ends or he reaches maximum medical improvement, whichever is first, and order the carrier to pay temporary income benefits, and medical benefits, in accordance with the 1989 Act. Accrued temporary income benefits shall be paid in a lump sum, together with applicable interest.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Thomas A. Knapp
Appeals Judge